RECOVERY OF MONEY PAID UNDER MISTAKE OF LAW.

In the well-known case of Bilbie *v.* Lumley[1], Lord Ellenborough asked counsel for plaintiff "Whether he could state any case where, if a party paid money to another voluntarily with a full knowledge of all the facts in the case, he could recover it back again on account of his ignorance of the law"? As a matter of fact there were several such cases in the books[2], and had they been urged upon the court it is altogether probable that they would have been followed and not improbable that the law would have been accordingly settled for all time. But counsel, though "a most experienced advocate,"[3] is reported to have made no reply, and Lord Ellenborough, declaring that "Every man must be taken to be cognizant of the law," established the rule that money paid by mistake of law, even under circumstances which make it inequitable for the defendant to retain it, is not recoverable.

The courts of law, while frequently evidencing the most pronounced dissatisfaction, have followed the rule with unusual consistency.[4] And peculiarly enough the courts of equity, though often granting relief from mistakes of law in other cases, have steadfastly refused in most jurisdictions to permit the recovery of money paid. It is the threefold purpose of this paper—first, to show that the reasons for this hard and fast rule of no recovery are unsound; second, to ascertain what, if any, encroachments upon the rule have been established; and third, by means of an examination of the different and unfortunately conflicting theories upon which equity has granted relief from mistakes

[1] (1802) 2 East 469.

[2] Hewer *v.* Bartholomew (1598) Cro. Eliz. 614; Bonnel *v.* Fouke 2 Sid. 4; Turner *v.* Turner 2 Rep. Ch. 3 ed. 81; Lansdowne *v.* Lansdowne (1730) 2 J. & W. 205; Bize *v.* Dickason (1786) 1 T. R. 285; and see Keener on Quasi-Contracts p. 85 (note).

[3] See Brisbane *v.* Dacres (1813) 5 Taunton 144.

[4] For collections of cases in both law and equity see 39 Am. Digest (Cent. ed.) column 438; and 22 Am. and Eng. Enc. of Law, p. 628.

of law in other cases, to determine upon the principle which, with proper regard for justice and sound policy, ought to be applied to the case of money paid.

I. THAT THE REASONS FOR THE RULE ARE UNSOUND.

The reason almost invariably assigned for the rule is that given by Lord Ellenborough in the leading case—"Every man must be taken to be cognizant of the law." This appears generally to be regarded (as it appears to have been regarded by Lord Ellenborough) as nothing more than a free translation of the maxim *Ignorantia juris non excusat.* But as Professor Keener has most forcefully shown,[1] the maxim quoted clearly implies a charge of delinquency —the commission of a crime, the breach of a contract or the commission of a tort, "and therefore assumes the existence of a defendant seeking to justify an act in the doing of which it is claimed he has violated some right," and has no proper application, either in law or in policy, to the case of one who has done no wrong and who seeks not to inflict a loss upon another, but to save himself from a loss.

Its identity with the recognized maxim *Ignorantia juris non excusat* being disproved, the statement that a man is presumed to know the law is found to be of decidedly questionable character. Said Lord Mansfield,[2] "as to the certainty of the law it would be very hard upon the profession if the law was so certain that everybody knew it." Said Abbott, C. J.,[3] "God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law." Said Maule, J.,[4] "There is no presumption in this country that every person knows the law. It would be contrary to common sense." And there are not a few cases in the books in which ignorance of the law has been permitted to be proved.[5]

It has been contended also that to permit a recovery would lead to the greatest uncertainty as to one's rights—

[1] Keener on Quasi-Contracts p. 87 *et seq.*

[2] Jones *v.* Randall (1774) Cowp. 37.

[3] Montrion *v.* Jefferies 2 C. & P. 113.

[4] Martindale *v.* Faulkner (1846) 2 C. B. 719.

[5] See cases cited by Prof. Keener in his Quasi-Contracts p. 87 *et seq.*

"there is no saying to what extent the excuse of ignorance might not be carried."[1] But the courts both in England and America have long conceded that money paid under mistake of *fact*, in circumstances which make its retention inequitable, may be recovered; and there appears to be no reason to fear that the excuse of ignorance of law would prove a greater temptation to the unscrupulous or a more effective weapon of injustice. Moreover, in the few jurisdictions which, as shall be seen, have made the experiment of permitting a recovery in case of mistake of law, there appears to be no abuse of the right nor dissatisfaction with the working of the rule.

Assuming then that it is not true that one is presumed to know the law, and further assuming that the danger of the abuse of the right would be no greater in one case than in the other, is there any other ground—any reason in justice or public policy which justifies the rule of no recovery? It is believed that there is not. On the contrary, it is believed that to permit a recovery, with limitations the same or similar to those with which the right to recover in cases of mistake of fact is hedged about, would sensibly diminish the area of human rights at present beyond the reach of the law.

II. What Encroachments upon the Rule have Been Established?

(1.) In at least two American jurisdictions—Connecticut and Kentucky—the alleged distinction between mistake of fact and mistake of law has been consistently denied. In the most frequently cited and quoted Connecticut case, Northrop's Executors *v.* Graves,[2] Chief Justice Church, in an admirably clear, trenchant opinion, says:

> "The mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts; the delusion is the same in both cases; in both alike, the mind is influenced by false motives."

[1] Lord Ellenborough in Bilbie *v.* Lumley (supra). See also Pomeroy on Equity Jurisprudence, Vol. 2, § 842, where it is said that "If ignorance of the law were generally allowed to be pleaded there could be no security in legal rights, no certainty in judicial investigations, no finality in litigations."

[2] (1849) 19 Conn. 548. See also Kane *v.* Morehouse (1878) 46 Conn. 300; Mansfield *v.* Lynch (1890) 59 Conn. 320.

In Kentucky the question has been presented in a variety of cases. Perhaps one of the most interesting is McMurtry *v.* Kentucky Central Railway Co.[1] The railway company, having paid a judgment in an action for personal injuries, with interest from the date of its rendition, brought suit to recover the amount paid as interest on the ground that it had been paid under a mistake, the statute providing that judgments for personal injuries, *inter alia*, should not bear interest. In giving judgment for the plaintiff, the court emphasized the fact that there had been no compromise or choice of courses by the company in making the payment.

"When the parties," says Holt, J., "regard a question of either law or fact as doubtful, and to avoid litigation, and by way of compromise, payment is made, then no recovery can be had; but in the case now before us no question was raised at the time as to the right of the claimant to interest. . . ."

In other cases in the same jurisdiction recovery has been permitted of meter rent paid by a consumer to a gas company, which, under a proper construction of the contract between the gas company and the city, the company had no right to charge;[2] of a liquor license fee paid under an invalid ordinance;[3] of money paid under an unconstitutional statute;[4] of taxes illegally assessed under a mistake of law.[5] As to taxes, however, it should be noted that it has been held[6] that when payment can be coerced only by suit, then if payment is made without suit no recovery will be allowed. This seems entirely to disregard the question of mistake, and erroneously to assume that the only possible ground of recovery is that of payment under compulsion of duress.

(2) In England,[7] two comparatively recent cases in equity show an inclination to disregard the arbitrary and unjust distinction between the recovery of money paid

[1] (1886) 84 Ky. 462; 1 S. W. 815.

[2] Capital Gas Co. *v.* Gaines (1899) 49 S. W. 462.

[3] Bruner *v.* Stanton (1897) 43 S. W. 411.

[4] Board of Trustees *v.* Board of Education (1903) 75 S. W. 225.

[5] City of Louisville *v.* Henning (1866) 1 Bush 381.

[6] Louisville & N. R. Co. *v.* Commonwealth (1890) 89 Ky. 531.

[7] See also the New Jersey case of Coudert *v.* Coudert (1887) 43 N. J. Eq. 407.

under mistake of law and relief from such mistakes in other cases. In the first, Rogers *v.* Ingham,[1] which has been referred to as "the modern leading case," it appeared that an executor, acting on the advice of counsel in the construction of a will, proposed to divide a fund in certain proportions between two legatees. One of the legatees, being dissatisfied, took the advice of counsel, which agreed with the former opinion. The executor then divided and paid over the fund, and two years later the dissatisfied legatee filed this bill against the executor and the other legatee, alleging a mistake in construing the will and claiming repayment from the other legatee. The prayer of the bill was denied, but the court appears to have based the decision, not on the ground that there could be no recovery of money paid under mistake of law, but on the ground that complainant having, after deliberation and advice, chosen one of two courses open to him, could not repudiate his election. And Mellish, L. J., significantly said:—

> "I think that, no doubt, as was said by Lord Justice Turner 'This court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact';[2] that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it."

In the second case, Daniel *v.* Sinclair[3] a mortgage account had been settled on the footing of compound interest, instead of simple interest, both parties erroneously supposing that compound interest was legally collectible, and though the court conceded that giving credit in an account was in many respects equivalent to payment, it held that the account might be reopened. "In equity," said the court, "the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn."[4]

(3) In at least four jurisdictions—California, North Dakota, South Dakota and Georgia—the rule has been modified by legislative enactment. In the first three, the statute, after providing that apparent consent is not free

[1] (1876) L. R. 3 Ch. Div. 351.

[2] Stone *v.* Godfrey (1854) 5 D. M. & G. 90.

[3] (1881) L. R. 6 App. Cases 181.

[4] See also *In re* Hulkes (1886) 33 Ch. D. 552.

when obtained through mistake and that mistake may be either of fact or of law, defines the latter as

(1) "A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify."[1]

The mistake defined in the second clause involves an element of fraud which affords a separate and obvious ground for relief. But the definition in the first clause is of a mistake in the true sense, and is remarkable in that by its terms relief is confined to cases in which the mistake is common to all parties. This is a distinction which, as will presently appear, has found some favor elsewhere. Its merits will be briefly discussed on a later page. At this point it is only necessary to note that while the statute does not expressly extend to cases of money paid, the exception of such cases has not been recognized. Thus, in Gregory *v.* Clabrough's Executors,[2] it was held that the proceeds of the crop upon mortgaged premises, paid by the mortgagor to the mortgagee on the advice of an attorney that the mortgagee was entitled thereto because the mortgage covered "rents, issues and profits" might be recovered as money paid under mistake of law common to all parties within the provisions of the code.

In Georgia, before the adoption of the statute, it had been held that money paid under a *mistake* of law, as distinguished from *ignorance* of the law, might be recovered, the court in one case[3] defining the distinction as follows:

"Ignorance implies passivity; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues diligence, which is commendable."

The statute appears to recognize this distinction, for it provides that "mere ignorance of the law" will not authorize the intervention of equity.[4] And in the following

[1] Calif. Civil Code § 1578; N. Dak. Civil Code § 3854; S. Dak. Civil Code § 1207.

[2] (1900) 129 Cal. 475.

[3] Culbreath *v.* Culbreath (1849) 7 Ga. 64. See also Lawrence *v.* Baubien (S. C. 1831) 2 Bailey, 623.

[4] Georgia Code § 3978.

section a further limitation of the jurisdiction appears to be raised by the provision defining the mistakes which are relievable as mistakes of law "as to the effect of an instrument on the part of both contracting parties."[1] Does this mean that unless the mistake of law be (1) as to the effect of an instrument, and (2) common to all parties, relief will not be granted? If so, the old rule of no recovery is but slightly relaxed.

(4) It has frequently[2] though not uniformly[3] been decided that the rule of no recovery does not extend, or at least "does not have so general application," to the case of the payment of money by public officers or public agents. The reason generally offered for this limitation is the importance of protecting the public funds and the interests of the community. But in some of the cases, where the *defendant* is a public officer or agent, stress is laid upon the fiduciary relation existing between the parties, or between the plaintiff's principal and the defendant.[4] As it was put in the case of County *v.* Grier:[5]

> "Fidelity to the government which he represents and is sworn to support, makes restitution a duty."

In still other cases it is contended that the reason for allowing a recovery is that the mistake of an agent is not chargeable to his principal.[6] A curious combination of all three notions is found in the opinion in the United States Court of Claims case of Barnes *v.* District of Columbia,[7] quoted with approval by the United States Supreme Court in Wisconsin Central Railway *v.* United States.[8]

---

[1] Georgia Code § 3979.

[2] Wis. Cent. Ry. Co. *v.* United States (1896) 164 U. S. 190; Barnes *v.* Dist. of Col. (1887) 22 Ct. of Cl. 366; Ellis *v.* Bd. of Auditors (1895) 107 Mich. 528; Heath *v.* Albrook (Iowa 1904) 98 N. W. 619; County *v.* Grier (1897) 179 Pa. 639; Bd. of Supervisors *v.* Ellison (1875) 59 N. Y. 620; Com. *v.* Field (Va. 1887) 3 S. E. 882.

[3] County *v.* Rundall (1880) 43 Mich. 137; Painter *v.* Polk Co. (1890) 81 Iowa 242; Peo. *v.* Foster (1890) 133 Ill. 496; See also Morgan Park *v.* Knopf (1902) 199 Ill. 444.

[4] Ellis *v.* Bd. of Auditors (1895) 107 Mich. 528; Bartlett *v.* United States (1839) Dav. 9, 24 Fed. Cases 1021.

[5] (1897) 179 Pa. 639.

[6] Board of Supervisors *v.* Ellis (1875) 59 N. Y. 620.

[7] (1887) 22 Court of Claims 366, 394. [8] (1896) 164 U. S. 190.

"The doctrine," says the court, "that money paid can be recovered back when paid in mistake of fact and not of law does not have so general application to public officers using the funds of the people as to individuals dealing with their own money when nobody but themselves suffer for their ignorance, carelessness, or indiscretion, because in the former case the elements of agency and the authority and duty of officers, and their obligations to the public, of which all persons dealing with them are bound to take notice are always involved."

In Iowa a distinction seems to be recognized between cases in which the particular payment sought to be recovered is within the general scope of corporate powers and is merely unauthorized but not prohibited by law, and cases in which the payment is clearly beyond the corporate powers or in direct violation of law. In the former class relief is denied,[1] in the latter granted.[2] Some such distinction is suggested also in the opinion of the Supreme Court of Illinois, in People *v.* Foster,[3] but in the *dicta* of later cases it is disregarded.[4]

(5) It has just been stated that in some of the cases which permit public corporations to recover money paid under mistake of law the decision seems to rest on the broad ground that a principal is not precluded by the mistake of his agent, whether of law or of fact. Perhaps in no case is the statement so unequivocally made as in Bartlett *v.* United States,[5] where Ware, J., said:

"However it may be when the money is paid by the supposed debtor, no case, that I am aware of, has gone so far as to decide that an unauthorized payment by an agent, from an erroneous opinion of the legal obligation of his principal, shall be binding on the principal, and that he cannot recover back money thus unduly paid."

If this proposition is sound, obviously it has an equal application to payments by agents of public corporations and payments by agents of private corporations and individuals; and since mistakes of corporations must inevitably be mistakes of their officers or agents, it follows that to a corporation as plaintiff relief must always be granted. No case in which the point is made in favor of individuals or private corporations, however, has been found.

(6) Some of the courts have evidenced their belief in the injustice and dishonesty of the rule of no recovery by

[1] Painter *v.* Polk Co. (1890) 81 Iowa 242.

[2] Heath *v.* Albrook (1904) 123 Iowa 559.

[3] (1890) 133 Ill. 496.

[4] Morgan Park *v.* Knopf (1902) 199 Ill. 444.

[5] (1839) Dav. 9, 24 Fed. Cases 1021.

refusing to extend it to cases of payments to trustees or other officers of the court.[1] Said Lord Justice James in the prominent case of *Ex parte* James:

"I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of the opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

This exception to the rule has been held in a few cases to extend to payments to attorneys-at-law, either by their clients or by others. For example, in the New York case of Moulton *v.* Bennett, where it appeared that the defendant in a litigation had paid to the plaintiff's attorney costs which were not legally chargeable, it was held that the money might be recovered.

III. THE PRINCIPLE THAT OUGHT TO BE APPLIED.

As was pointed out at the beginning of this paper,[2] the courts of equity, while generally denying a remedy for money paid under mistake of law, have frequently granted relief from such mistakes in other cases. But even in the latter cases they are by no means agreed as to the jurisdictional test. It is now proposed to examine the different theories that have been advanced, with a view to the selection of the true test—the test which ought in principle to be applied to cases of money paid as well as to all other cases.

(1) THAT RELIEF SHOULD BE GRANTED FROM MISTAKE OF ONE'S PRIVATE RIGHTS, BUT NOT FROM MISTAKE OF GENERAL LAW.

Perhaps the highest authority that can be quoted in support of this theory is Lord Westbury, "one of the ablest judges that ever sat in the English Court of Chancery."[3] In the prominent case of Cooper *v.* Phibbs,[4] referring to the maxim *Ignorantia juris non excusat*, he said:

[1] *Ex parte* James (1874) L. R. 9 Ch. Ap. 609; *Ex parte* Simmonds (1885) L. R. 16 Q. B. D. 308; Moulton *v.* Bennett (1863) 18 Wend. 586; Gillig *v.* Grant (N. Y. 1897) 23 App. Div. 596; Comm. *v.* Lancaster Co. (1891) 6 Pa. Dist. 371.

[2] See page 366. [3] Pomeroy, Eq. Jurisprudence § 842, note.

[4] 1867) L. R. 2 H. L. 149, 170.

"but in that maxim the word *jus* is used in the sense of denoting general law—the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law."

There has been a considerable tendency in courts of equity, particularly in England, to follow this distinction. The reason for the tendency has been stated by Mr. Pomeroy[1] as follows:

"A private legal right, title, estate, interest, duty, or liability is always *a very complex conception.* It necessarily depends so much upon conditions of fact, that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities, may be properly regarded—as in great measure they really are—and may be dealt with as mistakes of fact."

This amounts to saying that in the case of a misconception of a "private right" it is impracticable if not impossible to determine whether the misconception is primarily due to a mistake of fact or a mistake of law. Conceding the force of this argument, the fact remains that it places the modification of the rule of no relief solely upon the ground of expediency, rather than of principle. And even as a matter of expediency, it would seem that the new rule is as objectionable as the old—that it is quite as difficult to distinguish mistake of *private right* from mistake of *general law* as to distinguish mistake of fact from mistake of law. Of course, the distinction between general and private *statutes* is perfectly clear and thoroughly established, and the cases which grant relief from acts performed in ignorance of private statutes may at least be said to rest on intelligible grounds. But with the exception of such cases, is not every instance of a misconception of one's "right, title, estate, interest, duty or liability," if not a mistake of fact, a mistake of *general* law?

(2) THAT RELIEF SHOULD BE GRANTED FOR MISTAKE OF LAW COMMON TO ALL PARTIES—THAT IS TO SAY, WHERE THEY ALL ACT UNDER THE SAME MISAPPREHENSION OF LAW.

This modification of the rule of no relief, as has been seen,[2] has the sanction of legislative enactment in California, Georgia, and the Dakotas. But it has been justly con-

[1] Pomeroy on Eq. Jurisprudence § 849, note. [2] See page 370.

demned.[1] As a ground for the reformation of a contract, the necessity that the mistake shall be common to both parties is intelligible; but in other cases the reason for such a requirement is not apparent.

(3) THAT RELIEF SHOULD BE GRANTED FROM MISTAKES OF LAW MADE IN REDUCING TO WRITING A CONTRACT ALREADY AGREED UPON BY THE PARTIES, THE RESULT BEING THAT THE LANGUAGE OF THE WRITING HAS A MEANING OR EFFECT IN LAW DIFFERENT FROM THE INTENTION, AS DISTINGUISHED FROM A MISTAKE WITH REGARD TO THE LEGAL MEANING OR EFFECT OF A WRITTEN INSTRUMENT AGREED UPON AS REPRESENTING THE CONTRACT BETWEEN THE PARTIES.

This theory is a very popular one with both text writers and judges,[2] and is invariably sought to be supported with the argument that in the first-mentioned case there is no mistake as to the legal import of the *contract actually made;* but the mistake of law prevents the real contract from being embodied in the written instrument. The distinction, however, has been thought by careful students to be unsound. The strongest and clearest indictment of it, perhaps, is that of Mr. Bigelow, who says:[3]

"The writing is agreed upon as stating the contract in the one case as much as in the other. It matters not whether the parties say 'Here are the facts, and here is what on deliberation we want to do,' and then accept from the draftsman the written instrument and execute it as embodying their intention; or 'This writing on consideration we accept as truly expressing our intention and fix our signatures to it accordingly.' The second act may imply more deliberation concerning the writing; but in neither case may the deliberation have touched the legal difficulty which finally arises. . . . The distinction is trifling; it does not go to the root of the matter."

(4) THAT RELIEF SHOULD BE GRANTED FROM MISTAKE AS TO A CLEAR AND ESTABLISHED RULE OF LAW, AS DISTINGUISHED FROM MISTAKE AS TO A DOUBTFUL AND UNSETTLED RULE.[4]

[1] Pomeroy on Equity Jurisprudence § 846.

[2] Pomeroy on Equity Jurisprudence § 843, and cases cited. Story on Equity Jurisprudence § 114, and cases cited.

[3] Note to Story on Eq. Juris., 13th ed., § 110; also 1 Law Quart. Rev. 303.

[4] Story on Eq. Jurisprudence § 121, and cases cited.

Thus stated, this modification certainly cannot be supported. In the first place, it amounts to saying that the better known is a rule of law the less responsible is one for failing to know it. And in the second place, it seems certain that it would often be difficult to decide whether a given rule of law were clear and established or doubtful and unsettled, and that the varying conclusions of different courts would lead to embarrassment and confusion. An examination of the earlier cases in which the rule is stated, however, shows the probability that the intention was to distinguish *unconscious* from *conscious* ignorance of the law. Thus, in Naylor *v.* Winch,[1] Sir John Leach, V. C., said:

> "If a party acting in ignorance of plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of a compromise, a court of equity will relieve him from the effect of his mistake. But where a doubtful question arises, such as this question of construction upon the will of the testator, it is extremely reasonable that parties should terminate their difference by dividing the stake between them, in the proportions which may be agreed upon."

In other words, the distinction is between a genuine *compromise*, the parties knowing that they may be surrendering legal rights, and a settlement made "under the name of a compromise" but really in total and unconscious ignorance that any possible legal right is yielded. Stated in this way, the rule, as far as it goes, is perfectly sound, and is applicable alike to mistake of law and mistake of fact.[2] Moreover, it obviously suggests the further reaching modification next to be considered.

(5) THAT RELIEF SHOULD BE GRANTED, IF NEITHER AT THE TIME OF THE ACT NOR IN ANTICIPATION OF IT WAS THERE PRESENT TO THE MIND OF THE ACTOR A DOUBT AS TO THE LAW.

To put the distinction in another way, if one is conscious of a doubt as to his legal rights or duties, and with or without deliberation, with or without advice, chooses and enters upon a course of action, he should not be per-

[1] (1824) 1 Sim. & St. 555.

[2] Mr. Pomeroy escapes Sir John Leach's conclusion by insisting that he referred to family compromises only—such being governed admittedly by different considerations.

mitted to repudiate his choice; but if one conceives and enters upon a course of action in unconscious ignorance of any question as to his legal rights or duties, relief should be granted.

This theory is most ably supported by Mr. Bigelow,[1] who contends that it is the true doctrine of the leading case of Hunt *v.* Rousmanier,[2] — except that there it appears that in order to bar relief the choice must have been *deliberately* made. To quote Mr. Justice Washington[3]:

"We mean to say, that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehensions, and the insufficiency of such security' . . . direct a new security."

The notion that *deliberation* is essential to the denial of relief has appeared in other cases. For example, in Rogers *v.* Ingham,[4] Lord Justice James said:

"Where people have a knowledge of all the facts, and take advice, and whether they get good advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be opened."

But the test of *choice*—with or without deliberation—seems to be the more scientific one, and while, as has sufficiently appeared, the authorities on the subject are in the utmost confusion, there is no doubt that a large number of cases may be brought into line with it.[5] Moreover, it is a test which is supported by the cases of money paid under mistake of fact. For while it is there generally held that negligence in not knowing the fact is not a bar to recovery,[6] an examination of the cases will show that in most, if not all, of them the negligence referred to is an unconscious negligence—that is to say, the plaintiff, at the time of payment, entertained no doubt as to the facts. And, conversely, it is held that when the fact is disputed or acknowledged to be in doubt, a payment once made cannot be recovered[7]—even though the plaintiff has taken pains to

[1] Story on Equity Jurisprudence, 13th ed., Note to § 110 on mistake of law; also 1 Law Quart. Rev. 303.

[2] (1823) 8 Wheaton 174; 1 Peters 1. [3] 1 Peters 17.

[4] (1876) L. R. 3 Ch. D. 351.

[5] See Bigelow's note to Story on Eq. Juris., 13th ed., § 110.

[6] See Keener on Quasi-Contracts, p. 70, and cases cited.

[7] See Keener on Quasi-Contracts, p. 30, and cases cited.

investigate and satisfy himself as to the fact before making the payment.[1]

It is submitted, then, that this test of the jurisdiction to relieve from mistake is the true one in principle, and is adequately supported by authority. It is submitted that while not opening as wide a door as some of the tests previously examined and rejected, it would prove as satisfactory in its application to cases of *money paid* under mistake of law as it has already proved in its application to other cases of mistake of law and to cases of mistake of fact.

Finally, it is respectfully urged upon our courts and legislatures that without abrogating the present rule denying the recovery of money paid under mistake of law, but by confining its application to cases in which the money appears to have been paid with the consciousness of a doubt as to the law, the hardship of the rule will be minimized if not entirely eliminated, and the whole law of relief from mistake placed upon a basis of sound and consistent policy.

FREDERIC C. WOODWARD.

Northwestern University Law School,
Chicago, Illinois.

[1] McArthur *v.* Luce (1880) 43 Mich. 435.